

## Office of the Secretary, Education

## § 21.50

(ii) A request for further proceedings under § 21.44.

(c)(1) If the Department's counsel and the applicant believe that the issues in the application can be settled, they may jointly file a statement of their intent to negotiate a settlement.

(2)(i) The filing of a statement of an intent to negotiate extends the time for filing an answer for 30 days.

(ii) The adjudicative officer shall grant further extensions if the Department's counsel and the applicant jointly request those extensions.

(Authority: 5 U.S.C. 504(c)(1))

### § 21.42 Reply.

(a) Within 15 days after receiving an answer, an applicant may file a reply.

(b) If the applicant's reply is based on any alleged facts not in the record of the adversary adjudication, the applicant shall include with the reply either—

(1) Supporting affidavits; or

(2) A request for further proceedings under § 21.44.

(Authority: 5 U.S.C. 504(c)(1))

### § 21.43 Comments by other parties.

(a) Any party to a proceeding, other than an applicant or the Department's counsel, may file comments on—

(1) The application within 30 days after the applicant files the application;

(2) The answer within 30 days after the counsel files the answer; or

(3) Both, if the comments are filed within the time period specified in paragraphs (a)(1) and (a)(2) of this section.

(b) The commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that further participation is necessary to permit full exploration of matters raised in the comments.

(Authority: 5 U.S.C. 504(c)(1))

### § 21.44 Further proceedings.

(a) The adjudicative officer shall make the determination of an award on the basis of the written record.

(b)(1) However, the adjudicative officer may order further proceedings on his or her own initiative or at the re-

quest of the applicant or the Department's counsel.

(2) The adjudicative officer may order further proceedings only if he or she determines that those proceedings are necessary for full and fair resolution of issues arising from the application.

(3) If further proceedings are ordered, the adjudicative officer shall determine the scope of those proceedings, which may include such proceedings as informal conferences, oral arguments, additional written submissions, discovery, or an evidentiary hearing.

(4) An adjudicative officer may not order discovery or an evidentiary hearing for the issue of whether or not the Department's position was substantially justified.

(c) If the applicant or the Department's counsel requests the adjudicative officer to order further proceedings, the request must—

(1) Specify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to obtain that information or resolve those issues.

(Authority: 5 U.S.C. 504(a)(3) and (c)(1))

## Subpart F—How Are Awards Determined?

### § 21.50 Standards for awards.

(a) In determining the reasonableness of the amount sought as an award of fees and expenses for an attorney, agent, or expert witness, the adjudicative officer shall consider one or more of the following:

(1)(i) If the attorney, agent, or expert witness is in private practice, his or her customary fee for similar services; or

(ii) If the attorney, agent, or expert witness is an employee of the applicant, the fully allocated cost of the services.

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services.

(3) The time the attorney, agent, or expert witness actually spent on the applicant's behalf with respect to the adversary adjudication.